

**United States Department of Labor
Employees' Compensation Appeals Board**

B.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Madison, WI, Employer**

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**Docket No. 16-0809
Issued: July 21, 2016**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 10, 2016 appellant, through counsel, filed a timely appeal from a February 8, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish a lumbar condition causally related to factors of his federal employment.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 23, 2012 appellant, then a 43-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a displaced thoracic spinal cord, degenerative disc bulging, acute low back pain, lumbar pelvic muscle spasms, and subluxation as a result of his federal employment duties which entailed constant bending, reaching, and stooping.

This case has previously been before the Board. By decision dated February 7, 2013, OWCP denied appellant's claim finding that the medical evidence had failed to establish that his lumbar conditions were causally related to his accepted federal employment duties. Appellant requested reconsideration and by decision dated May 7, 2013, OWCP denied his request for reconsideration without reviewing the merits of the claim. On appeal, by decision dated March 21, 2014, the Board set aside OWCP's May 7, 2013 nonmerit decision.³ The Board determined that OWCP had failed to review newly submitted medical reports and remanded the case to OWCP to issue a *de novo* final decision after properly considering all of the evidence of record.

On remand, OWCP evaluated the medical evidence of record and, by decision dated July 17, 2014, affirmed the prior February 7, 2013 decision finding that the medical evidence failed to establish that appellant's conditions were causally related to his federal employment duties. On August 19, 2014 appellant filed an appeal of OWCP's July 17, 2014 decision. By decision dated December 12, 2014, the Board affirmed OWCP's July 17, 2014 decision finding that he had not met his burden of proof to establish that his diagnosed lumbar conditions were causally related to the accepted factors of his federal employment.⁴ The findings of fact and conclusions of law from the prior decision and order are incorporated herein by reference.

Following the Board's December 12, 2014 decision, appellant, through counsel, requested reconsideration before OWCP. By letter dated December 9, 2015, counsel requested reconsideration and noted submission of reports from William S. Middleton Memorial Veterans Hospital not previously considered.

In a June 18, 2015 hospital report, Dr. Thomas E. Looze, Board-certified in internal medicine, reported that approximately one month prior appellant began to experience a sharp increase in lower back pain with radiculopathy. Dr. Looze noted that appellant's primary pain related to the anterior left thigh and left knee. He also complained of pain in his back when sitting. Dr. Looze reported that appellant's occupation entailed driving a shuttle bus, as well as helping a friend manage a fitness gym. Appellant reported that he had been working out just prior to his most recent flare up. His routine, which included cardio work by exercising on a bike or treadmill for 15 minutes, started to irritate his back. Appellant also swam and did various resistance activities. Dr. Looze reviewed an April 25, 2014 magnetic resonance imaging scan of the lumbar spine. He discussed the importance of taking a more measured approach with the development of an exercise program, noting that appellant's impulsiveness with regard to

³ Docket No. 14-145 (issued March 21, 2014).

⁴ Docket No. 14-1819 (issued December 12, 2014).

switching up his program and how he demonstrated moving into end range positions with “jerky” motions that could cause spasming/reinjury. Dr. Looze explained that appellant presented to the emergency room with acute chronic lower back pain. He noted that appellant appeared to have performed a routine maintenance fitness program with options to try new things all the time. Dr. Looze indicated that appellant did not benefit from this approach which appeared to set him up for frequent reinjury. An accompanying progress note provided diagnoses of spinal stenosis, lumbar region without neurogenic claudication, intervertebral disc disease, lumbar radiculopathy, and chronic low back pain.

By decision dated February 8, 2016, OWCP affirmed the December 12, 2014 decision finding that the medical evidence failed to establish that appellant’s conditions were causally related to his federal employment duties.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.⁶

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁷ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁸

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized

⁵ Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

⁶ Michael E. Smith, 50 ECAB 313 (1999).

⁷ Elaine Pendleton, *supra* note 5.

⁸ See Roy L. Humphrey, 57 ECAB 238, 241 (2005); Ruby I. Fish, 46 ECAB 276, 279 (1994).

medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁹ The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹⁰

ANALYSIS

OWCP accepted that appellant engaged in repetitive activities as part of his employment duties as a letter carrier. It denied his claim, however, because the evidence failed to establish a causal relationship between those factors of his federal employment and his diagnosed conditions. The Board finds that the medical evidence of record is insufficient to establish that appellant's back conditions were causally related to factors of his federal employment as a letter carrier.

The Board notes initially that, with respect to the findings made in its prior decision dated December 12, 2014, those matters are res judicata absent any further review by OWCP under section 8128 of FECA.¹¹

The only new evidence received following OWCP's last merit decision on July 17, 2014 was a June 18, 2015 William S. Middleton Memorial Veterans Hospital report from Dr. Looze. The Board finds that his report fails to establish that appellant developed a lumbar injury as a result of his federal employment duties.¹²

In his June 18, 2015 report, Dr. Looze reported that approximately one month prior appellant began to experience a sharp increase in lower back pain with radiculopathy. His primary pain related to the anterior left thigh and left knee, but also complained of back pain when sitting. The Board notes that appellant has alleged a back injury in this claim with no allegations of a left thigh or knee condition. With respect to the lower back, Dr. Looze diagnosed acute chronic lower back pain. However, the findings of the physician are of no probative value as he is describing a symptom rather than a clear diagnosis of the medical condition.¹³ The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.¹⁴ While the accompanying progress note provided diagnoses of spinal stenosis, lumbar region without neurogenic claudication, intervertebral disc disease, lumbar

⁹ See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

¹⁰ *W.F.*, Docket No. 15-1208 (issued October 23, 2015); *James Mack*, 43 ECAB 321 (1991).

¹¹ *R.T.*, Docket No. 16-543 (May 20, 2013).

¹² *R.M.*, Docket No. 11-1921 (issued April 10, 2012).

¹³ *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁴ *Id.*

radiculopathy, and chronic low back pain, the report is of no probative value as it failed to provide any opinion regarding causal relationship.¹⁵

Dr. Looze failed to discuss appellant's employment duties as a letter carrier and provide a firm medical diagnosis which could reasonably be attributed to his federal employment duties. This is important as appellant informed the physician that he had been working out just prior to his most recent flare up and that his routine exercise on the bike and treadmill started to irritate his back. Dr. Looze also attributed appellant's lumbar condition to his exercise routine, noting that his impulsive movements and "jerky" motions could cause spasming/reinjury. He noted that appellant appeared to have performed a routine maintenance fitness program while also trying new exercises, but did not benefit from this approach, which appeared to set him up for frequent reinjury. Given that his report provides support for a nonoccupational injury to the lumbar region, Dr. Looze's opinion is of no probative value in establishing a work-related injury.¹⁶

In the instant case, the record lacks rationalized medical evidence establishing a causal relationship between appellant's federal employment duties as a letter carrier and his back injury. Thus, appellant has failed to meet his burden of proof.¹⁷

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his lumbar condition is causally related to the accepted factors of his federal employment as a letter carrier.

¹⁵ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁶ *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

¹⁷ *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board